



COMMONWEALTH OF KENTUCKY
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20-ORD-195

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In re: Mary Delaney/Cabinet for Health and Family Services

Summary: Cabinet for Health and Family Services ("Cabinet") violated the Open Records Act ("the Act") when it failed to respond timely to a records request. The Cabinet also violated the Act when it cited an inapplicable statute as the basis for denying the request. However, the Cabinet corrected its error on appeal and properly denied the request under KRS 213.071(4). Under that provision, "evidence of adoption, paternity determination, or paternity acknowledgment" is not subject to inspection except upon order of a court of competent jurisdiction.

Open Records Decision

Mary Delaney ("Appellant") requested a copy of "the records attached to the birth certificate of Donald William Shain on June 17, 1957." The Cabinet received the request on October 5, 2020, and denied the request on October 19, 2020. To deny inspection the Cabinet relied upon KRS 209.140. This appeal followed.

Normally, a public agency must respond to an open records request within three business days. KRS 61.880(1). To address the public health emergency caused by the novel coronavirus, however, the General Assembly modified that requirement when it enacted Senate Bill 150 ("SB 150"), which became law on March 30, 2020, following the Governor's signature. SB 150 provides, notwithstanding the provisions of the Act, that "a public agency shall respond to

the request to inspect or receive copies of public records within 10 days of its receipt.” SB 150 § 1(8)(a). Under KRS 446.030(1)(a), the computation of a statutory time period does not exclude weekends unless “the period of time prescribed or allowed is less than seven (7) days.” Accordingly, under SB 150, a public agency must respond to a request to inspect records within ten calendar days.

The Cabinet received Appellant’s request on October 5, 2020, but it did not respond to that request until October 19, 2020 — nine days beyond the modified deadline permitted by SB 150. Thus, the Cabinet violated the Act.

On appeal, the Cabinet acknowledges that the basis for its denial was erroneous. The Cabinet claims that it should have invoked KRS 213.071 instead of KRS 209.140. KRS 61.880(1) requires a public agency to briefly explain the statutory basis for its denial of a request to inspect public records. Because the Cabinet admits that it relied upon a statute that does not permit withholding the records requested, this Office finds that the Cabinet violated the Act.

Under KRS 213.071(4), however, when a new birth certificate is issued as a result of an adoption or a judicial determination of paternity, the “new certificate shall be substituted for the original certificate of birth in the files, and the original certificate of birth and the original certificate of birth and the evidence of adoption, paternity determination, or paternity acknowledgment shall not be subject to inspection except upon order of a court of competent jurisdiction.” This provision clearly permits the Cabinet to withhold the records requested.

Appellant argues that KRS 213.071, which was first enacted in 1990, should not apply where the paternity determination was made in 1957. She claims that to apply KRS 213.071 in this instance would require the improper retroactive application of the statute. However, the language at issue provides that these records “*shall not be* subject to inspection.” KRS 213.071(4) (emphasis added). Therefore, the statute does not have any retroactive application. *See, e.g., Utility Mgt. Group, LLC v. Pike County Fiscal Ct.*, 531 S.W.3d 3, 10 (Ky. 2017) (finding that the right to inspect records vests at the time of the request).¹ Rather, the statute

¹ Appellant relies on a previous opinion, rendered by this Office in 1991, to support her claim that these records cannot be “retroactively” exempted from disclosure. Although OAG 91-25 concluded that KRS 213.071 could not apply to prevent inspection of birth certificates created

prohibits inspection of these types of records. For this reason, the Cabinet properly denied Appellant's request.

A party aggrieved by this decision may appeal it by initiating action in the appropriate circuit court pursuant to KRS 61.880(5) and KRS 61.882. Pursuant to KRS 61.880(3), the Attorney General shall be notified of any action in circuit court, but shall not be named as a party in that action or in any subsequent proceedings.

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/s/ James M. Herrick

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Distributed to:

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prior to 1990, the Kentucky Supreme Court has rejected such reasoning. *See generally Utility Mgt. Group, LLC v. Pike County Fiscal Ct.*, 531 S.W.3d at 10.